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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Further Streamlining	)	CC Docket No. 01-150
Measures for Domestic Section 214	)	
Authorizations	)	

COMMENTS OF AT&T CORP.

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Pursuant to the Notice of Proposed Rulemaking in the above-captioned proceeding,[1] AT&T Corp. ("AT&T") hereby submits these comments regarding the proposed streamlining of the Commission's review of section 214 applications to acquire domestic transmission lines through assignments or transfers of corporate control. *See* 47 U.S.C. § 214.

INTRODUCTION AND SUMMARY

AT&T strongly supports streamlining of the Commission's rules governing the assignment of, and transfer of corporate control over, domestic section 214 authorizations. The Commission streamlined its rules governing the assignment of and transfer of control over common carrier radio licenses nearly three-and-a-half years ago and streamlined its international section 214 application process more than two years ago. In each instance, streamlining has substantially reduced regulatory burdens without any impairment of the Commission's ability to safeguard the public interest.

Broad streamlining in the domestic section 214 context would produce even greater public interest benefits. In today's dynamic and competitive environment, the vast majority of transactions involving entities holding section 214 authorizations telecommunications carriers do

[1] Declaratory Ruling and Notice of Proposed Rulemaking, FCC 01-205 (July 20, 2001).

not raise any significant public interest concerns. No such concerns are likely ever to be raised by internal corporate restructurings and comparable transactions in which the same owners continue to exercise control over the entity holding the section 214 authorization. The *Notice* properly recognizes that these type of *pro forma* transfers should be broadly streamlined. Indeed, as in the wireless and international section 214 context, the Commission should extend blanket authorization to all *pro forma* domestic section 214 transactions. *See infra* Part I.

The *Notice* also correctly recognizes that even outside the *pro forma* context, transactions involving carriers without market power are unlikely to raise significant competitive concerns. Streamlining of these applications is therefore also in the public interest. However, the *Notice* proposes to grant streamlining on the basis of market power "proxies" that do not accurately measure market power. Worse yet, the proposed standards are not administratively practical and would inevitably lead to disputes about whether parties in fact qualify for streamlining. *See infra* Part II.

The Commission should instead establish a bright-line standard that protects the public interest by promulgating a rule that presumptively streamlines applications by non-dominant carriers to assign or transfer section 214 authorizations. Under this approach, applications to assign or transfer control of section 214 authorizations by non-dominant carriers would be granted automatically within 30 days of public notice of the application. However, to allow for the full and fair review of the very few non-dominant carrier transactions that raise significant public interest issues (*e.g.*, the proposed Sprint-WorldCom merger), the Commission would retain full discretion to pull any application out of the streamlined "queue." The 30-day approval window would give the industry and the public sufficient time to file comments to alert the

Commission to any legitimate public interest issues that might not be apparent on the face of the initial filing.

Streamlined treatment is not appropriate for section 214 applications involving dominant carriers, especially incumbent local exchange carriers ("LECs"). The Bell Atlantic-NYNEX, Bell Atlantic-GTE, Ameritech-SBC and US WEST-Qwest mergers, and the merging parties post-merger conduct, vividly confirm what economics teaches: dominant carriers can and do use mergers to preserve their existing monopolies and to leverage those monopolies into adjacent markets. Indeed, SBC and Verizon continue to flout the "market-opening" merger conditions the Commission determined were necessary for those otherwise clearly anticompetitive combinations to satisfy the public interest standard, finding it preferable instead to pay substantial fines using the monopoly rents that they continue to collect from their massive, captive customer bases. *See* S. Young, *SBC Has Paid Large Penalties For Phone Service to Rivals, Verizon Will Start Sending Installments to the U.S. Government This Month*, The Wall Street Journal Europe (Aug. 8 2001) (2001 WL-WSJE 2872042). The public interest therefore demands rigorous scrutiny of these dominant carrier mergers, and streamlining should be limited to transactions involving non-dominant carriers.

It is also important to recognize that the full benefits of domestic section 214 streamlining cannot be achieved unless exit certification under section 214 is appropriately streamlined. Although the Commission has issued specific rules that apply in the event of a "discontinuance," 47 C.F.R. § 63.71, there is considerable confusion as to what constitutes a "discontinuance" triggering application of those rules. The Commission should confirm that a carrier holding a section 214 authorization must comply with the notification procedures of Rule 63.71 only in those instances when the carrier *actually* is discontinuing service. Where there is, at most, a technical "discontinuance" and customers continue to receive the same services from what is in all relevant respects the same carrier – as is the case with *pro forma* corporate restructurings, assignments of section 214 authorization between already affiliated entities, and spin-offs and similar transactions that transfer control directly to shareholders – there is no legitimate reason to require carriers to undertake the extremely costly and time-consuming customer notifications required by Rule 63.71. Requiring notification in these circumstances affirmatively harms the public interest by causing customer confusion with no corresponding benefit. *See infra* Part III.

Finally, the Commission should maintain its existing distinction between sales of assets and transfers of corporate control. There is no evidence that carriers are abusing this distinction by engaging in "sham" asset sales. And both economics and experience confirm that asset purchases generally do not raise the type of competitive concerns that would trigger strict scrutiny by the Commission and preclude blanket section 214 approval. *See infra* Part IV.

ARGUMENT

I. NO PRIOR COMMISSION APPROVAL SHOULD BE NECESSARY FOR *PRO-FORMA* ASSIGNMENTS AND TRANSFERS OF CORPORATE CONTROL OF SECTION 214 AUTHORIZATIONS.

AT&T strongly endorses the *Notice*'s conclusion (¶¶ 27-28) that broad streamlining should be granted to *pro forma* assignments and transfers of corporate control of section 214 authorizations. As the *Notice* observes, the Commission has already provided similar streamlining in the context of international section 214 authorizations and radio licenses used to provide commercial mobile radio services ("CMRS"). *Id.* ¶¶ 17, 19. By definition, these *pro forma* assignments and transfers raise no public interest concerns because "*pro forma* transactions do not affect actual control of the licensee," but "merely allow licensees to modify their corporate organization or ownership structure in a non-substantial way from the structure previously approved by the Commission." *Wireless Streamlining Order*, 13 FCC Rcd. 6293, ¶¶ 12, 13 (1998). *See also International Streamlining Order*, 14 FCC Rcd. 4909, ¶ 42 (1999) ("Regulatory review of these transactions yields no significant public interest benefits, but may delay or hinder transactions that could provide substantial financial, operational, or administrative benefits to carriers.").

In both the CMRS and international section 214 contexts, the Commission has identified specific examples of transactions that are *pro forma* in nature. These include:

> (1) Assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests;
>
> (2) Assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests;
>
> (3) Assignment or transfer by which certain stockholders retire and the interest transferred is not a controlling one;
>
> (4) Corporate reorganization that involves no substantial change in the beneficial ownership of the corporation (including reincorporation in a different jurisdiction or change in form of the business entity);
>
> (5) Assignment or transfer from a corporation to a wholly owned direct or indirect subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests;[2] or
>
> (6) Assignment of less than a controlling interest in a partnership.

[2] To dispel any potential confusion, the Commission should confirm that this category includes the assignment or transfer of section 214 authorizations between two subsidiaries that are wholly owned (directly or indirectly) by the same corporate parent.

47 C.F.R. § 63.24(a); *Wireless Streamlining Order* ¶ 8 (citing 47 C.F.R. § 73.3540(f)). Each of these categories of transactions should be considered *pro forma* in the domestic section 214 context as well.[3]

More broadly, the Commission should take this opportunity to clarify that the above-enumerated transactions are only *examples* of a general rule. Thus, in its final rule, the Commission should provide that *pro forma* streamlining applies to *any* purely internal corporate restructuring – *i.e.*, any transaction (or series of transactions) in which the same shareholders that own and control the company which initially holds a section 214 authorization will own and control the "new" company that holds the section 214 authorization and to spin-offs and similar transactions that transfer control directly to shareholders that already own and control the entity holding the section 214 authorization.

The Commission should also follow its prior precedent as to the procedures that should govern *pro forma* assignments and transfers of section 214 authorizations. Just as in the international section 214 and wireless contexts, no prior Commission approval should be required for a *pro forma* assignment or transfer. *International Streamlining Order* ¶¶ 42-43; *Wireless Streamlining Order* ¶ 33. To ensure accurate records, however, the Commission should require the entities engaging in a *pro forma* transaction to file written notice of the transaction within 30 days of consummation of the *pro forma* transaction. *See* 47 C.F.R. § 63.24(b).

[3] The Commission should also codify its existing practice of treating as *pro forma* the transfer of section 214 authorization to the debtor in possession in the case of carriers filing for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code and the debtor-in-possession's subsequent Bankruptcy Court-approved transfer of Section 214 authorizations to another non-dominant carrier. *See Notice* ¶ 27.

II. STREAMLINED REVIEW SHOULD BE PRESUMPTIVELY AVAILABLE FOR ALL ASSIGNMENTS AND TRANSFERS OF CORPORATE CONTROL OF SECTION 214 AUTHORIZATIONS INVOLVING NON-DOMINANT CARRIERS.

As the *Notice* properly recognizes, streamlining should not be limited to *pro forma* transactions. Even when there is an actual (rather than *pro forma*) transfer of a section 214 authorization from one company to another or a change of control in the entity holding an authorization, the transfer will not generally raise legitimate public interest concerns. That is why the Commission today routinely approves the vast majority of section 214 applications, albeit in a timeframe that is far too uncertain and far too long for a marketplace that runs on Internet time.

Recognizing this, the *Notice* seeks comment on a number of different criteria that could be used to determine categories of transactions that would be presumptively in the public interest. In each instance, the *Notice* seeks a "proxy" for whether or not the applicants individually exercise market power. *Notice* ¶¶ 23-24. That makes good sense because, generally speaking, even "horizontal" mergers or acquisitions involving competing firms are unlikely to raise substantial public interests concern when the firms lack market power. Rather, "[c]ompeting firms typically merge for reasons entirely unrelated to effects on marketwide output or price – for example, to achieve economies of scale or integration, to put inefficiently run assets into the hands of superior management, to resolve management succession for an individually owned enterprise, or for tax or other reasons." P. Areeda, H. Hovenkamp & J. Solow, ANTITRUST LAW ¶ 901a, at 6-7 (rev. ed. 1998).[4] However, the criteria set forth in the *Notice* are particularly poor proxies for market power.

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[4] *See also generally* F. Easterbrook, *The Limits of Antitrust*, 63 Texas Law Review 1 (Aug. 1984) (most mergers are pro-competitive); R. Barkow & P. Huber, *A Tale of Two Agencies: A*
(continued . . .)

The *Notice* seeks comment, for example, on whether the availability of streamlining should turn on the "size" of transaction, as measured by the merging parties' net sales or assets. *Notice* ¶ 22. Such considerations swim against nearly 100 years of learning under the Sherman Act and other antitrust statutes. There is simply no correlation between a firm's absolute size (whether measured in terms of assets or sales) and market power. P. Areeda, H. Hovenkamp & J. Solow, Antitrust Law ¶ 904, at 25-29 (rev. ed. 1998); *id.* ¶ 908, at 46-53.[5] The creation of a large firm has no negative economic consequences for consumers so long as consumers still have available competing alternatives or barriers into the market are sufficiently low to constrain the firm's prices. P. Areeda, H. Hovenkamp & J. Solow, ANTITRUST LAW ¶ 904, at 28-29 (rev. ed. 1998); *id.* ¶ 905g, at 37-38. That is why a firm's absolute size (regardless of how it is measured) plays no role in the government's antitrust analysis of mergers and acquisitions. *See generally* U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (rev. Apr. 8, 1997). *See also* H. Hovenkamp, FEDERAL ANTITRUST POLICY Ch. 12 (1994) (describing federal merger policy).

The proposed "size" standard is contrary to Commission precedent too. Exempting "small" non-dominant carriers from regulatory burdens while continuing to impose such

(. . . continued)
Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers, 2000 U. Chi. Legal F. 29 (2000) (same); R. Bork, *The Antitrust Paradox* (1993) (same).

[5] *See also 60 Minutes with Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division,* 55 Antitrust L.J. 255, 259 (1986) ("[O]bviously, when we turn to antitrust analysis we are not concerned with aggregate concentration or with absolute size, the things that are featured most prominently in the popular discussion. Our concern, obviously, is whether a merger will have an adverse effect on competition in any properly defined market."); J. Klein, *Antirust Enforcement in the Twenty-First Century,* 32 Conn. L. Rev. 1065, 1068-1069 (Spring, 2000) (explaining that "big is bad" view of mergers has been universally rejected by federal antitrust agencies and economists).

regulations on "large" non-dominant carriers "only reduces competitive performance in the market." *AT&T Int'l Non-Dominance Order*, 11 FCC Rcd. 17,963, ¶ 8 (1995). It is precisely because of that fact that the D.C. Circuit has repeatedly held that the Commission cannot give preferences to one group of non-dominant carriers at the expense of another. *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996); *Western Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

That use of an absolute size threshold to determine eligibility for streamlining would produce absurd results can be vividly illustrated by a simple example. Suppose that General Electric and General Motors merged. That would create the largest company in the world, but would raise no public interest issues with regard to any necessary transfer of section 214 authorization because the merging parties would quite obviously be unable to exercise power in any relevant telecommunications market. *See also Ameritech-SBC Merger Order*, 14 FCC Rcd. 14,712 (1999) (Commissioner Furchtgott-Roth, Concurring In-Part, Dissenting In-Part) ("[M]ergers of companies like Mobil and Exxon involve the transfer of a substantial number of radio licenses . . . and yet we take no Commission-level action on those transfer applications.").

These flaws could not be fixed by only looking at the "size" of the applicants' "telecommunications business," as measured by the number of access lines, number of local exchange areas served or telecommunications revenues. *See Notice* ¶ 22. Again, these criteria do not even purport to measure concentration in a relevant economic market, let alone whether either applicant can exercise market power in a relevant market. For example, the total number of access lines cannot be controlling as to whether market power exists as those lines can be spread throughout a broad region encompassing numerous distinct "geographic" markets and the applicants might therefore have only a relatively small presence in each relevant geographic market.[6] Similarly, a firm can have "high" overall telecommunications revenues, but these revenues could be derived from many, economically distinct "products."[7] Thus, the proposed standard would be both over- and under-inclusive. It would, for example, block streamlining of an application involving a "large" carrier whose revenues are derived from several distinct geographic and/or product "markets" that each have numerous competitors and low barriers to entry while permitting streamlining of an application to acquire a direct competitor by a "small" carrier, such as a rural incumbent LEC, that possesses market power in a single market but does not serve, in absolute terms, a high number of customers.

Nor should the streamlining determination turn solely on the merging firms' market shares. Although the proposed "market share" proxy is at least relevant to the market power inquiry, the Commission has long recognized that high market share alone is not dispositive of whether market power exists. *See Notice* ¶ 23. Regardless of firms' current market shares, a determination of their market power requires an assessment of an array of dynamic factors that impact the incentive and ability to control price or output. *See* H. Hovenkamp, FEDERAL ANTITRUST POLICY § 3.1b (1994) ("Market share is an incomplete proxy for market power."). "Even a firm with a very large market share cannot automatically be presumed to have market

[6] The geographic market is "the geographic area in which [a company] faces competition and to which consumers can practically turn for alternative sources of the product." *Baxley-DeLamar v. American Cemetary Assn.*, 938 F.2d 846, 850 (8th Cir. 1991).

[7] "The outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Thus, if consumers do not treat different services as being reasonable substitutes for each other, they are in different "product" markets.

power; more research would be needed regarding whether there are competitive factors such as ease of entry, excess capacity held by competitors, etc., that would defeat any attempt by the firm to exercise market power despite its very large market share." *Prime Time Access Rule*, 11 FCC Rcd 546, ¶ 24 n.44 (1995). Indeed, it has been "many years since anyone knowledgeable about" such matters "thought that concentration by itself imported a diminution in competition." *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7th Cir. 1994). *See also United States v. Baker Hughes*, 908 F.2d 981, 986 (D.C. Cir. 1990).

Thus, the Commission has consistently rejected market power claims that focused on static shares without regard to dynamic considerations. In its *AT&T Non-Dominance Order*, 11 FCC Rcd 3271 (1995), for example, the Commission rejected claims that AT&T could exercise market power in the domestic long distance market at a time when AT&T served significantly more than half of all long distance customers. Despite AT&T's relatively high share, the Commission concluded that it lacked market power because other long distance providers could and would "expand to serve additional AT&T customers should AT&T attempt to charge a supra-competitive price." *See id.* ¶ 62. Indeed, the Commission has held that market share is *irrelevant* where there is other evidence that a carrier lacks market power. *COMSAT Non-Dominance Order*, 13 FCC Rec. 14,083 ¶ 111 (1998). And when the Commission has departed from this precedent, the D.C. Circuit has reversed the agency's actions. *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001).

Further, using "market share" to determine eligibility for streamlining would lead to numerous disputes about whether a particular application does, in fact, qualify for streamlining. As Professor Hovenkamp observes:

> Conceptually, computing market shares seem easy. The fact finder sums total

> market output and places it in the denominator of the fraction, with the output of the firm under consideration in the numerator. The resulting fraction, expressed as a percentage, gives the firm market share. But the difficult issue is deciding which numbers to use in the fraction: revenues, units of output manufactured, units of output sold, capacity, or perhaps some other numbers reflecting a compromise of these.

H. Hovenkamp, FEDERAL ANTITRUST POLICY § 3.7 (1994). Indeed, the *Notice* itself recognizes (¶ 23) that in many telecommunications markets that there is no one "single" correct measure of "market share." Credible arguments could be made that access lines, revenues, customers, or minutes should be the basis for calculating shares. Inevitably, certain applications would qualify for streamlining under one share measurement but not another leading to prolonged disputes as to whether or not the applicants properly qualify for streamlining. Further, to the extent that the market shares of the numerous firms providing telecommunications services in a particular market cannot be computed from available data – and for many markets this will be the case – a market share measure could preclude streamlining altogether.

There is simply no reason to rely upon imperfect "proxies" for market power, when the Commission's existing rules already directly identify those carriers that can actually wield market power. Under existing Commission rules and precedent, carriers are identified as either "dominant" or "non-dominant." A dominant carrier is "a carrier found by the Commission to have market power," 47 C.F.R. § 61.3(q); a non-dominant carrier is a "carrier not found to be dominant," *id.* § 61.3(y). And pursuant to this framework, the Commission has already adjudicated whether the vast majority of telecommunications carriers in the U.S. are dominant or non-dominant. *See COMSAT Non-Dominance Order* ¶¶ 7-13; *AT&T Non-Dominance Order* ¶¶ 3-9. Accordingly, applications to assign or transfer control of section 214 authorizations involving non-dominant carriers should be presumptively streamlined and applications involving dominant carriers should not.

AT&T recognizes that, in rare circumstances, even transactions involving non-dominant carriers can raise significant public interest issues. In the presence of high barriers to entry and strong network effects, for example, a particular consolidation between carriers with substantial market shares could facilitate the ability of the merged entity to exercise market power. *See, e.g.*, *MCI-WorldCom Merger Order*, 13 FCC Rcd. 18,025, ¶¶ 142-50 (1998). Thus, the Commission's streamlining rules must be sufficiently flexible to ensure that potentially anticompetitive transactions are not simply rubber-stamped while giving truly expedited treatment to the vast majority of transactions that raise no public interest issues.

AT&T respectfully submits that the following approach would satisfy these twin objectives. All transactions involving the assignment of section 214 authorizations and acquisitions of control of entities holding section 214 authorizations between non-dominant carriers should be presumptively entitled to streamlined treatment. The Commission would publish the application in a public notice and invite comment as to whether there are any substantial public interest concerns that should preclude the application from receiving streamlined treatment. If no action is taken by the Commission, the application would be deemed approved 30 days after it was noticed.

However, to the extent commenters are able to demonstrate significant public interest issues, the Commission would retain the discretion to pull the application out of the streamlined queue. *See Notice* ¶ 32. At that point, the Commission could direct the applicants to respond to significant issues raised by the commenters and provide, if necessary, for the filing of a supplemental public interest statement and/or an additional round of comments. This process, which mirrors the way in which international section 214 applications are currently reviewed, *see*

47 C.F.R. § 63.12, would give the Commission ample opportunity to identify legitimate public interest issues and see that they are properly resolved.

The paperwork that must accompany a streamlined section 214 application should also be reduced. *See Notice* ¶ 30. Under current procedures, many applicants feel obligated to file a public interest statement providing a detailed antitrust analysis of all relevant markets in which the entities operate and an explanation of the affirmative benefits of the transfer of acquisition of corporate control. Instead, for transactions involving non-dominant carriers, the Commission should establish guidelines that require applicants to identify only the markets in which they compete and the extent of their presence in those markets. This information, along with publicly available information, should be more than sufficient to allow commenters and the Commission to identify any potential anticompetitive issues associated with the application. A more detailed "case-in-chief" should only be required in those exceptional cases where the Commission determines streamlined treatment of the application is not appropriate.

Just as streamlining is presumptively appropriate for applications involving non-dominant carriers, it is plainly *inappropriate* for dominant carriers such as incumbent LECs. *See Notice* ¶ 26. The Commission has now had the opportunity to review numerous section 214 applications involving incumbent LECs – including incumbent LEC mergers[8] and combinations of incumbent LECs and other non-dominant carriers[9] – and in these cases the Commission found that, but for ameliorative conditions, granting the requested transfer authority would disserve the

[8] *See generally Bell Atlantic NYNEX Merger Order*, 12 FCC Rcd. 19985 (1997); *Ameritech-SBC Merger Order*; 14 FCC Rcd. 14712 (1999); *Bell Atlantic-GTE Merger Order*, 15 FCC Rcd. 14,032 (2000).

[9] *See Qwest-US WEST Merger Order*, 15 FCC Rcd. 5376 (2000).

public interest. For example, the Bell Atlantic-NYNEX and Ameritech-SBC mergers eliminated the very real prospects of competition between the merging carriers. *Bell Atlantic-NYNEX Merger Order* ¶¶ 8-12; *Ameritech-SBC Merger Order* ¶ 5. As Professors Areeda and Hovenkamp note, "a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive." P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 701d, at 135 (rev. ed. 1996). *Accord, Bell Atlantic-NYNEX Merger Order* ¶ 66 & n.155.

Similarly, because of their control over critical last mile facilities that are bottleneck facilities for local, long distance and advanced telecommunications services, "vertical" mergers involving incumbent LECs also raise significant competitive issues. Thus, the Commission approved the Qwest-US WEST merger only on the condition that US WEST divest Qwest's long distance assets in US WEST incumbent territories, *Qwest-US WEST Merger Order* ¶ 3; the Commission approved the Bell Atlantic-GTE merger only on the condition that Bell Atlantic divest GTE's Internet backbone facilities, *Bell Atlantic-GTE Merger Order* ¶ 2; and the Commission approved the Verizon-OnePoint merger only on the condition that OnePoint cease providing voice and Internet long distance services in Verizon territories, *Verizon-OnePoint Merger Order*, 15 FCC Rcd. 24,165, ¶ 6 (2000).

The Bell Atlantic-GTE and Qwest-US WEST mergers in particular provide a stark illustration of the need for the Commission to conduct an extensive inquiry of the acquisition of carriers by Bell operating companies ("BOCs"). In each instance, the BOCs failed fully to disclose the nature of relevant operations and advanced proposals that were inadequate to bring their mergers into compliance with section 271 of the Communications Act. It was only after a full ventilation of the issues by the Commission and the industry that the BOCs grudgingly agreed to give up ownership and control of assets used to provide in-region long distance services. *See Qwest-US WEST Merger Order* ¶¶ 14-27; *Bell Atlantic-GTE Merger Order* ¶¶ 26-91.

In short, although it cannot be said than any section 214 assignment to an incumbent LEC or transfer of corporate control to an incumbent LEC is inevitably anticompetitive (or violation of section 271), experience and common sense confirm that such transactions need to be carefully scrutinized. Consequently, streamlined treatment of applications involving incumbent LECs and other dominant carriers is inappropriate.

III. THE COMMISSION MUST ALSO REFORM ITS DISCONTINUANCE RULES IN ORDER TO OBTAIN THE FULL BENEFITS OF STREAMLINING SECTION 214 APPLICATIONS.

Section 214 of the Communications Act states that "[n]o carrier shall discontinuance, reduce, or impair service to a community . . . unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." Although the Commission has recently detailed procedures for providing notification to consumers when there is a discontinuance, *see* 47 C.F.R. § 63.71, there remains significant confusion in the industry as to what constitutes a "discontinuance" requiring Commission exit certification. The full benefits of streamlining the section 214 application process ultimately will not be realized if the Commission requires carriers to provide costly and unnecessary public discontinuance notification in instances where there is no real discontinuance of service. In order to harmonize the Commission's entry and exit rules under section 214, AT&T submits that the Commission should also clarify the scope of its discontinuance rules in the following two respects.

First, the Commission should clarify that there is no "discontinuance" within the meaning of section 214 when a firm engages in a *pro forma* assignment or transfer of corporate control. The dictionary definition of "discontinue" is to "put an end to: terminate" or "to cease trying to continue or accomplish: abandon." Webster's II (1984). As discussed above, there is no "termination" or "abandonment" of service from a *pro forma* transaction such as corporate restructuring, assignments of section 214 authorization between already affiliated entities, and spin-offs and similar transactions that transfer control directly to shareholders. Indeed, there is not even a material change in who owns and controls the legal entity providing service as a result of these *pro forma* transactions and *pro forma* transactions do not affect the service being received by consumers in any material way.

Any "discontinuance" in this context is purely technical and requiring carriers to comply with the notification requirements of Rule 63.71 would only impose significant costs – on both the carriers involved and, as a result of the inevitable confusion that would follow customer notification, consumers – without achieving any public interest benefit. Thus, as an alternative to finding that there has been no "discontinuance" within the meaning of section 214, the Commission could simply grant blanket exit authority to any "discontinuance" that results from *pro forma* transactions and forbear from applying the notification requirements of Rule 63.71.

Second, the Commission should likewise clarify that no exit certification or customer notification is required under section 214 when there is a transfer of corporate control. In this context the legal entity holding the section 214 authorization has not "discontinu[ed]" service within the plain meaning of that term. The legal entity holding the section 214 authorization does not "terminate" or "abandon" service; to the contrary, the entity holding the section 214 authorization provides the exactly the same service the moment before and the moment after a change in control. All that changes in such transactions is the identity of the ultimate owners of the carrier that continues providing service.

In the alternative, the Commission should grant blanket exit certification to changes of corporate control. As the Commission has recognized, the central purpose of section 214 is to protect consumers from the sudden loss of service. *1999 Section 214 Streamlining Order*, 14 FCC Rcd. 11,364, ¶ 5 (1999) ("The section 214(a) exit requirements ensure that service to communities may not be discontinued without advanced notice to the public and Commission authorization."); *see also id.* ¶ 29. That concern is not implicated by a change of corporate control because the change in ownership of the entity holding the section 214 authorization does not by itself cause any change in the services provided by the entity holding the section 214 authorization.[10]

In sum, where there is, at most, a technical "discontinuance" and customers continue to receive the same services from what is in all relevant respects the same carrier – as is the case with *pro forma* corporate restructurings, assignments of section 214 authorization between already affiliated entities, and spin-offs and similar transactions that transfer control directly to shareholders – there is no legitimate reason to require carriers to undertake the extremely costly and time-consuming customer notifications required by Rule 63.71. Requiring notification in these circumstances virtually guarantees customer confusion with no corresponding benefit. That is because application of Rule 63.71 in this context would result in consumers receiving notification that their existing carrier will be "discontinuing" service but that they will continue

[10] To be sure, the new ownership could decide to abandon a particular service (or services) provided by the carrier over which control was acquired. But so too could the prior owners. The point is that the time at which service is actually discontinued is the time at which Rule 63.71 should apply.

to be served by either that very same carrier or another entity that has the same parent company as the existing parent and will continue to provide the identical service using the same brand name as the carrier "discontinuing" service. And it is for the reasons, in the related context of application of the Commission's slamming rules to corporate restructurings, the Commission has held that transactions that are "invisible" to subscribers are not subject to the Commission's slamming rules. *See Section 258 Streamlining Order*, FCC 01-156, CC Docket Nos. 94-129, No. 00-257, ¶ 13 (May 15, 2001).

IV. THE COMMISSION SHOULD CONTINUE TO PROVIDE BLANKET SECTION 214 AUTHORIZATION TO ACQUISITIONS OF ASSETS.

The Commission seeks comment on whether it should retain its rule granting blanket section 214 authorization to the acquisition of regulated assets. *Notice* ¶ 25. The *Notice* recognizes that transfers of a company's assets – without any corresponding transfer of the control of the company or of the company's section 214 authorizations – is unlikely to have any adverse impact on the public interest. *See id.* This is consistent with basic antitrust economics. In most asset purchases, there is no increase in concentration and "neither firm has an ongoing equity interest in the other." P. Areeda, H. Hovenkamp & J. Solow, ANTITRUST LAW ¶ 900a, at 4-5 (rev. ed. 1998). However, the *Notice* asks whether its rules requiring Commission approval of acquisitions of corporate control of an entity holding a section 214 authorization can be evaded by structuring such a transaction as a series of asset sales.

Although this technique could theoretically be used to avoid Commission scrutiny of an acquisition of corporate control, there is no evidence that any carrier has sought to engage in sham "asset" purchases. To the extent that the Commission properly streamlines section 214 applications, incentive to engage in "sham" asset transactions to avoid section 214 review will be significantly diminished. Rather than throw the baby out with the bath water and eliminate blanket approval for asset purchases – which, as noted, raise few public interest concerns – the Commission should simply reaffirm that parties are not permitted to avoid Commission approval of change of corporate control transactions by disguising such transactions as asset sale transactions and that the Commission retains authority, where necessary, to look beyond the form of a transaction.

CONCLUSION

For the reasons stated above, the Commission should (1) streamline *pro forma* transactions; (2) streamline applications by non-dominant carriers for assignments of section 214 authorizations and acquisition of corporate control; (3) clarify that section 214 exit certification is not require for *pro forma* transactions or transactions which do not result in actual discontinuance of service by the carrier holding the section 214 authorization; and (4) retain its blanket authorization for transfers of assets.

Respectfully submitted,

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September 10, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 10^{th} day of September, 2001, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 10^{th}, 2001
Washington, D.C.

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